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Lessons from the International Law Commission to codify unilateral acts of the States. Problems, discussion and evolution of international law

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LESSONS FROM THE INTERNATIONAL LAW COMMISSION TO CODIFY UNILATERAL ACTS OF THE STATES. PROBLEMS, DISCUSSION AND EVOLUTION OF INTERNATIONAL LAW

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Abstract: This paper seeks critically and with the jurisprudential methodology of the International Court of Justice to shed light on the work carried out for many years within the International Law Commission in relation to unilateral acts. Is this a completed work, or is the codification missing? Is there arrogance of certain States that want to follow their own interests in the codification of the work completed? Is there a non-compliant silence from other States that have not taken a concrete position during the proceedings? These are some of the topics that are presented and discussed in this work. The completed work cannot be said to be a codification work, but a work in progress for the next few years. Many gaps and many problems perhaps due to the lack of international good faith. The obligation of the participating States is to take into consideration the substance and raise awareness of the importance of this work in order to be able to speak of a work far from the Vienna

Convention in the coming decades but certainly of an original codification that every international convention must have.

Key words: ICJ, ILC, unilateral acts, international public law, VCLT.

Introduction

In recent years, the increase in unilateral deeds favored by technological changes (Sarendahl, 2019) has been a subject of constant evolution and discussion but of considerable uncertainty regarding the results obtained (Eckart, 2012; Kolb, 2014; Becker, 2017; Cohen, Klein, 2017; Zimmermann, Tams, Oellers Frahm, Tomuschat, 2019; Liakopoulos, 2020a)[1]. The

1The hypothesis of two unilateral appeals having the same object must be assimilated to the compromise, since the situation that is determined in this case is entirely similar to that deriving from the ad hoc agreement. This is essentially what occurred at the time of the dispute over the legal status of the south-eastern territory of Greenland, of which the PCIJ was invested with unilateral appeals of substantially identical content deposited on the same day, specifically on 18 July 1932, by Norway and Denmark (CPJI, Series C, No. 69, par. 10ss). ICJ, Sentence of 20 December 1974 nuclear experiments, Australia v. France and New Zealand v. France, CIJ Reports, 1974. For a favorable solution to the persistent topicality of the dispute, notwithstanding the exception of non lieu raised by the defendant, see the arrest warrant of 11 April 2000, Democratic Republic of Congo v. Belgium of 14 February 2002, ICJ, Reports, 2002, par. 253, 274. ICJ, Certain Activities Carried Out by Nicaragua in the Border Area, Order of 22 November 2013, ICJ Reports 2013, para. 1. ICJ, Frontier dispute (Burkina Faso v. Republic of Mali), in ICJ Reports, 22 December 1986, parr. 23-26 and 27. Obligation to negotiate access to the Pacific ocean (Bolivia v. Chile) of 1st October 2018, par. 140. See also: Arbitral tribunal, Boundary Dispute between Argentina and Chile concerning the Frontier Line between Boundary Post 62 and Mount Fitzroy, RIAA XXII, 21 October 1994, parr. 72-73: "(…) international law has rules which are used for the interpretation of any legal instrument, be it a treaty, a unilateral instrument, an arbitral award, or a resolution of an international organization. For example, the rule of the natural and ordinary meaning of the terms, the rule of reference to the context and the rule of the practical

International Law Commission (ILC) has dedicated years of study on the subject but without being able to produce ad hoc convincing results arriving only in 2006 to adopt the Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations (D'Aspremont, 2005; Barsalon, 2006; Rivier, Lagrange, 2006; Tomuschat, 2008; Eckart, 2012; Kassoti, 2013; Saganek, 2015)[2]. In particular, ILC's object is:

"(…) to clarify the functioning of (unilateral legal acts) and what the legal consequences are, with a clear statement of the applicable law (…)" (Eckart, 2012)[3].

These are fairly general Guiding Principles, sporadic and without concrete points of reflection[4], despite the fact that there

effect are all general rules of interpretation. There are also norms that establish standards of interpretation for specific categories of rules (…)".

2The Guiding Principles included in Report of the International Law Commission on the work of its fifty-eighth session, 1 May-9 June and 3 July 11 August 2006 (ILC Report 2006), in Yearbook of the International Law Commission, 2006, vol. II, n. 2, 16.

3Report of the Working Group on unilateral acts of States (Report of the Working Group 1997), UN Doc. A/CN.4/L.543 of 8 July 1997, par. 5. According to Eckart: "(…) the disappointment with respect to initial expectations is well expressed by the words of an author, according to whom the very title of the document adopted by the Commission-Guiding Principles-would be improper and misleading, since (…) the Principles fail to offer essential guidance in central aspects within their very field of application (…)". The need to provide states with more solid references to evaluate "with reasonable certainty" if and possibly to what extent their unilateral conduct can bind them internationally is also underlined in the Introductory note of the Commission which precedes the text of the Guiding Principles, in ILC Report 2006, op. cit., 160, par. 173. Pellet affirms that: "(…) aim was to tell States the extent to which they risked becoming trapped by their own declarations, i.e. their own commitments. States needed to know, for example, what statements they could make in the international arena without such statements being regarded as legal acts that could be used against them (...)" (UN Doc. A/CN.4/2853 of 19 July 2005, in Yearbook of the International Law Commission, 2005, vol. I, 153ss., 153, par. 5, A. Pellet, ILC, Summary Record of the 2525th meeting, UN Doc. A/CN.4/SR.2525, para. 43) and Xue (UN Doc. A/CN.4/2854 of 20 July 2005, in Yearbook of the International Law Commission, 2005, vol. I, 160ss., 165, par. 55).

4According to Dugard, "(…) unilateral acts was unlike any other the Commission had dealt with in the past" (UN Doc. A/CN.4/SR.2722 of 21 May 2002, in Yearbook

were many working groups and a heated debate among the participating States[5] but at the same time a certain lack of interest in a codification of the law of unilateral acts (Evans, 2018; Shaw, 2018; De Frouville, Decaux, 2020; Dupuy, Kerbrat, 2020; Aledo, 2021; Alland, 2021; Daillier, Forteau, Miron, Pellet, Quoc Dinh, 2022) and a scarce availability of data in practice[6].

The only confirmation that can be seen by reading the text of the ILC and the related Guiding Principles is the ability of unilateral to produce (especially under certain conditions) binding effects for the States that use them. Of course we can speak of international law of unilateral acts as acts capable of imposing obligations on the States involved as authors. On this Venzke affirms:

"(…) international law is made the moment it comes into existence through the recognized channels of legal sources (…) the act of interpretation is then imagined as an act of discovery downstream (…) the international legal norm is supposed to contain within itself what the act of interpretation discovers

of the International Law Commission, 2002, vol. I, 69ss., 76, par. 57). And according to Brownlie: "(…) the topic was colossally difficult (...)" (UN Doc. A/CN.4/SR.2726 of 28 May 2002, in Yearbook of the International Law Commission, 2002, 98ss, 103, par. 41).

5In argument see the positions of Koskenniemi and Pellet: UN Doc. A/CN.4/SR.2726, op. cit., 100 ss., par. 17ss and UN Doc. A/CN.4/SR.2818 of 16 July 2004, in Yearbook of the International Law Commission, 2004, vol. I, 181ss., par. 1 ss. and UN Doc. A/CN.4/2853, op. cit., 154, par. 7ss.

6UN Doc. A/CN.4/511 of 6 July 2000, in Yearbook of the International Law Commission, 2000, vol. II, n. 1, 266ss. UN Doc. A/CN.4/524 of 18 April 2002, in Yearbook of the International Law Commission, 2002, vol. II, n. 1, 85 ss. UN Doc. A/C.6/58/SR.18 of 30 December 2003, par. 48. see the position of Austria (par. 90), Japan (par. 60); Netherlands (par. 19); Portugal (par. 60, par. 13); Malaysia: UN Doc. A/C.6/58/SR.20 of 6 January 2004, par. 19; Venezuela, UN Doc. A/C.6/58/SR.21 of 15 January 2004, par. 23).

(…)" (Zenzke, 2017).

Unilateral acts are however excluded from the discussion of the responsibility of the States and especially from art. 12 of 2001 relating to the object of the offence. The unlawfulness of state conduct has also been referred to as the violation of any primary norm regardless of the source which includes unilateral acts (Liakopoulos, 2020b)[7]. We can therefore speak of mandatory norms of the international law and especially after the adoption of the principles guide arriving at 2019 with a provision to the effects of the contrast with the mandatory norms of unilateral acts of binding commitments[8].

ILC and its work for the unilateral acts of States

During and after the conclusion of the work of the ILC on the liability of States and the codification of treaties with the Vienna Convention on the Law of Treaties of 1969 (VCLT) (Dörr, Schmalenbach, (eds.), 2018; Fitzmaurice, Merkouris, 2020; Shirlow, Gore, 2022) the debate on unilateral acts has been taken into consideration[9]. The discussion in the agenda of the

7Draft articles on responsibility of States for internationally wrongful acts (DARSIWA), with commentaries, in Yearbook of the International Law Commission, 2001, vol. II, n. 2, 30 ss., 3: "States may assume international obligations by a unilateral act" and 4 with the comment of art. 12, 55.

8Text of the draft conclusions and draft annex provisionally adopted by the Drafting Committee on first reading, UN Doc. A/CN.4/L.936 of 29 May 2019, in particular the Draft conclusion 15 entitled: "Obligations created by unilateral acts of States conflicting with a peremptory norm of general international law (*jus cogens*)".

9"(…) as the sources of international law were concerned, the Commission had recently completed a very far reaching and comprehensive draft on the law of treaties, and it would be difficult to suggest another source of international law that was as

ILC as "a proper subject for immediate consideration(...)"[10]dates back to 1996 for the first time. The ILC organized the related working group with the aim of verifying the feasibility of the project[11]. The opportunity for codification was important for the international practice of unilateral acts and based on the availability of arrangement of the related material to ensure the legal certainty, predictability and stability of international relations through the identification of the relevant rules[12]. The related working group[13] decided to formally start the codification starting with the special rapporteur, the Venezuelan Victor Rodríguez Cedeño. Through Resolution 52/156 of 26 January 1999, the General Assembly ratified the Commission's

wide in scope. A limited counterpart to the law of treaties could, however, be found in the topic of unilateral acts, concerning which ample research and practice were available and which greatly needed clarification and systematization (…)", in UN Doc. A/CN.4/SR.928 of 23 June 1967, in Yearbook of the International Law Commission, 1967, vol. I, 178 ss., 179, par. 6). See also: Survey of international law: Working paper prepared by the Secretary General, UN Doc. A/CN.4/245 of 23 April 1971, in Yearbook of the International Law Commission, 1971, vol. II, n. 2, 1 ss., 60 ss., par. 279 ss.).

10Report of the International Law Commission on the work of its forty-eighth session, 6 May26 July 1996 (ILC Report 1996), in Yearbook of the International Law Commission, 1996, vol. II, n. 2, 9798, par. 248 and Addendum 3, in Yearbook of the International Law Commission, 1996, vol. II, n. 2, 141ss: "(…) the law of treaties is far from exhausting the much more general topic of "Sources of international law" which was envisaged as a global topic of codification in the memorandum submitted by the Secretary General at the first session, in 1949. This is not a subject which in itself could even be completely codified: but it appears that some more precise topics are mature and could be fruitfully studied and be the object of draft articles (...)".

11Report of the Commission to the General Assembly on the work of its forty-ninth session (ILC Report 1997), in Yearbook of the International Law Commission, 1997, vol. II, n. 2, 8, par. 8.

12Report of the Working Group 1997, op. cit., par. 5.

13ILC Report 1997, op. cit., 64, par. 194.

decision to include the theme in its agenda[14]. The works were quantitative and qualitative and fragmented for about 10 years[15].The working groups were busy for the specific deepening of the definition of the general orientation of the same results of the codification (Tomuschat, 2008)[16].

The result of working groups despite the relative commitment and fragmentation of work in sectors involved in the theme resulted in the inconsistency due to the antitheticality and the hostileness of various States involved as members of the ILC[17]. The object of the works, their aims, the approach to define one's work through an ad hoc codification fueled long discussions without significant progress in the study of the subject. Perhaps the problem was not based on the time spent but on various

14See par. 8 of the Resolution.

15Report of the International Law Commission on the work of its fiftieth session, 20 April-12 June and 27 July-14 August 1998, in Yearbook of the International Law Commission, 1998, vol. II, n. 2, 58 ss., par. 192; Report of the International Law Commission on the work of its fifty-first session, 3 May-23 July 1999 (ILC Report 1999), Yearbook of the International Law Commission, 1999, vol. II, n. 2, 133ss, par. 577ss. Report of the International Law Commission on the work of its fifty-second session, 1 May-9 June and 10 July-18 August 2000, Yearbook of the International Law Commission, 2000, vol. II, n. 2, 9998, par. 620ss. Report of the International Law Commission on the work of its fifty-third session, 23 Apri-l1 June and 2 July-10 August 2001, Yearbook of the International Law Commission, 2001, vol. II, n. 2, 205, par. 254; Report of the International Law Commission on the work of its fifty-fifth session, 5 May-6 June and 7 July-8 August 2003 (ILC Report 2003), Yearbook of the International Law Commission, 2003, vol. II, n. 2, 57 58, par. 303ss. Report of the International Law Commission on the work of its fifty-sixth session, 3 May-4 June and 5 July-6 August 2004, Yearbook of the International Law Commission, 2004, vol. II, n. 2, 96, par. 245 ss. Report of the International Law Commission on the work of its fifty-seventh session, 2 May-3 June and 11 July-5 August 2005 (ILC Report 2005), Yearbook of the International Law Commission, 1998, vol. II, n. 2, 62, par. 327ss.

16According to Tomuschat: "(...) eventually saved the project was the establishment of a working group at each session (...)".

17Crawford (UN Doc. A/CN.4/SR.2596 of 2 July 1999, in Yearbook of the International Law Commission, 1999, vol. I, 208 ss, 210, par. 28).

opinions that the need to narrow the final result led the working group to focus on only self-contained formal acts capable of creating obligations for the States involved to consider all unilateral conduct capable of producing concrete legal effects.

The first report presented by the special rapporteur noted: "(…) a doctrinal study, draft articles, a set of guidelines or recommendations or a combination of the above (...)"[18]. The method used had consisted in the search for a series of rules applicable to all the unilateral acts taken into consideration (D'Aspremont, Besson, Knuchel, 2017; Kamto, 2021)[19]. We are talking about different acts which appear to hinder the identification of a minimum regime applicable to each of the relevant hypotheses[20]. The draft articles proposed as a result of the encompassing approach were never approved, therefore a different path was decided in 2003 by proceeding with the analysis of the types of unilateral acts widespread in international practice starting from the recognition that the special rapporteur himself dedicated to his sixth report[21]. The

18ILC Report 1997, op. cit., 6667, par. 214.

19Rodrìguez Cedeño, Fourth report on unilateral acts of States, UN Doc. A/CN.4/519 of 30 May 2001, in Yearbook of the International Law Commission, 2001, vol. II, n. 1, 115 ss., 115, par. 2.

20Report of the Commission to the General Assembly on the work of its fifty-fourth session (ILC Report 2002), in Yearbook of the International Law Commission, 2002, vol. II, n. 2, 83, par. 369. See also the comments of Brownlie: "whether the topic was a unified subject" (UN Doc. A/CN.4/SR.2524 of 5 May 1998, in Yearbook of the International Law Commission, 1998, vol. I, 32 ss., 35, par. 30).

21Rodrìguez Cedeño, Sixth report on unilateral acts of States, UN Doc. A/CN.4/534 of 30 May 2003, in Yearbook of the International Law Commission, 2003, vol. II, n. 1, 53 ss.

differentiation of the work and the insistence of the ILC to continue searching for a lowest common denominator has once again shown the identification and definition of the same work[22]. The work was consolidated towards the continuation of the codification of unilateral acts in 2022[23]. In our opinion, the difficulty remains in identifying a unitary and significant concept of unilateral acts as an autonomous matter of international law and in continuous discussion[24] and in particular the suggestion proposed by some members[25] that the Commission has decided to give up any desire to codify of the matter, choosing to follow the adoption of a series of Guiding Principles that will be applicable to unilateral declarations, where: "(...) could help and guide States while providing for greater certainty in the matter (...)"[26]. The Special Rapporteur, in his ninth and last report noted that:

22"(…) doubts were expressed about the methodology used by the Special Rapporteur. From his prior global approach he had shifted to a case by case study in order to identify general rules applicable to all unilateral acts. It was not clear how his monographic studies would tie in with the ultimate objective of the exercise, namely the elaboration of draft articles enabling States to realize when they ran the risk of being ensnared by the formal expression of their will (...)" (ILC Report 2003, op. cit., 55, par. 278).

23Comments of Brownlie, in UN Doc. A/CN.4/SR.2772, 9 July 2003, in Yearbook of the International Law Commission, 2003, vol. I, par. 4, and the comments of Addo in UN Doc. A/CN.4/SR.2818, Yearbook of the International Law Commission, 2004, par. 28.

24According to Koskenniemi: "(…) the Commission was trying to codify something which did not exist as a legal institution and was at a loss as to how to define it so as to make it a legal institution (…)", UN Doc. A/CN.4/SR.2772, op. cit., 74, par. 42 and UN Doc. A/CN.4/SR.2818, op. cit., 181, par. 2; UN Doc. A/CN.4/2854, op. cit., 153, par. 7.

25Comments of Candioti in: UN Doc. A/CN.4/SR.2854, op. cit., 162, par. 23.

26ILC Report 2005, op. cit., 61, par. 314.

"(…) Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations (...)[27] have represented the basis for the elaboration, by the working group on unilateral acts (…)".

This new group was followed by Pellet's organization and with a final text approved by consensus by the Commission in 2006[28] and then transmitted in the same year to the General Assembly[29].

(Follows): Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations

The attempt to integrate the study of the sources of international law was elaborated by the codifications relating to the law of treaties[30] established as far back as 1997 for acts which:

"(...) intended to produce "legal" effects, creating, recognizing, safeguarding or modifying rights, obligations or legal situations (...)"[31].

A position that was followed by the special rapporteur Rodríguez Cedeño himself who already expressed through his first report:

"(...) the intention to limit the scope of the investigation to the formal unilateral acts put in place by States for the purpose of creating legal obligations[32] (...) on the basis of the consideration that the most important

27Rodrìguez Cedeño, Ninth report on unilateral acts of States, UN Doc. A/CN.4/569 and Add.1 of 6 April 2006, in Yearbook of the International Law Commission, 2006, vol. II, n. 1, 147 ss, 173 ss, par. 125 ss.

28ILC Report 2006, op. cit., 161ss.

29See also par. 3 of the resolution of General Assembly n. 61/34 of 18 December 2006, which is affirmed that: "(…) the Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations under the topic "unilateral acts of States" (…) and commends their dissemination (...)".

30Addendum n. 3, ILC Report 1996, op. cit., 141 ss.

31Report of the Working Group 1997, op. cit., par. 9.

32Rodrìguez Cedeño, First report on unilateral acts of States, UN Doc. A/CN.4/486 of 5 March 1998, in Yearbook of the International Law Commission, 1998, vol. II, n. 1, 320ss, 323, par. 14 and especially par. 170: "(…) an autonomous expression of clear and unequivocal will, explicitly and publicly issued by a State, for the purpose of creating a juridical relationship in particular, to create international

legal act is the strictly unilateral declaration embodying unilateral obligations (...)"[33].

Already in his second report in a more evolutionary way:

"(...) he proposed for the purposes of codification a definition of unilateral acts limited to expressions of will formulated by the States (...) with the intention of acquiring international legal obligations (...)"[34].

The working group of 1999 followed up with a revision of this definition where it replaced the expression:

"(…) with the intention of acquiring international legal obligations (...)", an overly restrictive position, with "(…) the intention to produce legal effects on the international plane (...) to also take into account the acts adopted in order to acquire or maintain rights (...)"[35].

The Special Rapporteur has adapted to this perspective[36].

The question never really ended and the Commission remained divided into two camps. The first followed the path of limiting the field of investigation on the formal acts capable of autonomously creating rights and obligations at an international level. The second followed the extension of unilaterally conducted codification works and declarations capable of

obligations between itself and a third State which did not participate in its elaboration, without it being necessary for this third State to accept it or subsequently behave in such a way as to signify such acceptance (…)".

33See also the comments of Simma, UN Doc. A/CN.4/SR.2525 of 6 May 1998, in Yearbook of the International Law Commission, 1998, vol. I, 42ss, 43, par. 8 ss.

34Rodrìguez Cedeňo, Second report on unilateral acts of States, UN Doc. A/CN.4/500 and Add.1 of 14 April and 10 May 1999, in Yearbook of the International Law Commission, 1999, vol. II, n. 1, 195 ss., 200, par. 38 and especially par. 51: "(…) author of the act must express unequivocally the will to create a juridical norm comprising an obligation for the author and rights for other subjects (…)".

35ILC Report 1999, op. cit., 138, par. 587.

36"(…) the purposes of the present articles, "unilateral act of a State" means an unequivocal expression of will which is formulated by a State with the intention of producing legal effects in relation to one or more other States or international organizations, and which is known to that State or international organization (…)", Rodrìguez Cedeňo, Third report on unilateral acts of States, UN Doc. A/CN.4/505 of 17 February 2000, in Yearbook of the International Law Commission, 2000, vol. II, n. 1, 247 ss, 256, par. 80.

producing legal effects, also including the principle of the silence and acquiescence.

In reality, if we think better, we understand that we are back to a more restrictive path from the one proposed ab initio by the special rapporteur[37]. Already in the preamble it is specified that the Guiding Principles:

"(...) concern only unilateral acts (...) those taking the form of formal declarations formulated by a State with the intent to produce obligations under international law (...)" (Saganek, 2015)[38].

It actually includes the special category of unilateral acts that constituted by promissory declarations (Rivier, Lagrange, 2006; Tomuschat, 2008; Eckart, 2012)[39]. The debate in the Commission seems to be oriented exclusively to this type of unilateral act which mainly refers to international jurisprudence which has been cited throughout the codification process.

The final text of the Guiding Principles concerns the acts formulated by the States: "(...) in exercise of their freedom to act on the international plane (...)" excluding those that exercise powers attributed by other norms of international law[40].

37"(…) a unilateral declaration formulated by a State with the intent of producing certain legal effects under international law (…)", Rodrìguez Cedeño, Ninth report, op. cit., 174, par. 137.

38ILC Report 2006, op. cit., 161, par. 176.

39In particular, Tomuschat affirms that: "(...) the renunciation and the recognition would fall among the unilateral acts to which the final text refers, since the State which renounces certain rights and/or claims or which recognizes a certain factual situation would thereby assume the obligation not to adopt conduct incompatible with one's unilateral determination. This interpretation is indeed in line with what was indicated by the Special Rapporteur in his fourth report, where, in an attempt to provide a classification of unilateral acts, waiver and recognition had been included among the acts "by which the State assumes unilateral obligations" (...)".

40ILC Report 2006, op. cit., 160-161, par. 174.

The Commission, even in this case, had not always shown an unequivocal attitude. Already in its preliminary study of 1997, the working group had expressed:

"(...) that it was necessary to leave out of the scope of the investigation the declarations of acceptance of the compulsory jurisdiction of the Court of international justice, in consideration of the contractual foundation of such acts (…)"[41].

A different solution had been followed in relation to the declarations having to do with the extension of the territorial sea or the establishment of the exclusive economic zone, therefore the law of the sea. Such acts were identified by: "(…) legal situations which are opposable to other States and are permitted by international law (…)" (Barsalon, 2006), without reference of any weight to the fact that the effects of such declarations are defined by an instrument of a conventional nature, i.e. the United Nations Convention on the Law of the Sea, which among other things reproduces customary international law.

The special rapporteur had insisted on the requirement that the act expressing the will of the State produce effects independently of any link with a pre-existing and specific (material) norm of international law. In reality he had excluded the acts: "(…) which constitute the exercise of a power granted by the provisions of a treaty or by a rule of customary law (...)"[42]. We are talking about declarations concerning the

41Report of the Working Group 1997, op. cit., par. 13.

42Rodrìguez Cedeño, First report, op. cit., 332, par. 105; see also the Second report, op. cit., 197, par. 8: "(…) acts that are of interest to the Commission in the present study, however, are legal acts which, in addition to being unilateral in form,

creation and/or extension of marine areas[43] as well as the relative exclusion of non-autonomous acts[44]. A path that we can characterize as ambiguous and without a concrete convincing result given that we are dealing with a regime applicable to the distinction of the legal basis of the obligation relating to the applicable regime[45]. The source of the unilateral obligation in the strict sense does not prevent the application of acts that have a unilateral form and the same rules of validity, revision and interpretation that are envisaged for unilateral acts (Tomuschat, 2008)[46]. The applicable regime requires greater attention to this chosen path.

The Guiding Principles and its content

The application of the Guiding Principles establish the declarations made public by the States and manifest the will to constrain the final effect of creating new legal obligations. The conditions for this are met and the binding nature of the

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are autonomous or strictly unilateral-in other words, not linked to a preexisting norm, be it of treaty or customary origin (…)".

43Rodrìguez Cedeño, Third report, op. cit., 254, par. 54.

44Rodrìguez Cedeño, Ninth report, op. cit., 173, parr. 129 and 130.

45See the Guiding Principles n. 7 and 8, in ILC Report 2006, op. cit., 165.

46According to Tomuschat: "(…) complain about the inconsistency of the choice of exclusion from the scope of application of the Guiding Principles. With regard to the unilateral declarations of acceptance of the jurisdiction of the International Court of Justice, however, he believes that they are "fully regulated by an international treaty", which is why "it was certainly wise to refrain from proposing overlapping rules that would apply concomitantly with the prescriptions of the ICJ Statute". That such declarations are by no means "fully regulated" by the Statute is on the contrary demonstrated by the uncertainties that have emerged regarding the regime applicable to them both in the jurisprudence of the Court itself (…)".

declarations is based on good faith (Kolb, 2017). The States must show and entrust the work of the Commission and the obligations they must respect[47]. The Guiding Principle n. 7 specifies:

"(...) that a unilateral declaration can lead to obligations for the State only if it is expressed in clear and precise terms (...). The obligations deriving from this declaration must be adopted by a restrictive interpretation (…). The obligations deriving from the declaration must be reconstructed by giving prominence first of all to the text of the declaration, together with the context and the circumstances in which the declaration itself matured (…)" (Eckart, 2012)[48].

Guiding Principle no. 2 establishes that all States: "(…) have the ability to assume obligations through unilateral declarations (…)". It is a provision modeled and based on art. 4 VCLT (Shirlow, Gore, 2022). This position occurred both from writing and oral statements (Gardam, 2001)[49]. The final text welcomes a broad solution as can be read and understood through the Guiding Principle n. 6:

"(...) unilateral declarations can be directed against one or more States or against the international community as a whole[50](...) against other bodies (…)" (Saganek, 2015)[51].

47See Guiding Principle n. 3, in ILC Report 2006, op. cit., 161.

48The comment of par. 2, affirms that: "(…) a great caution in determining the legal effects of unilateral declarations, in particular when the unilateral declaration has no specific addressee (…)".

49ICJ, Legality of the threat or use of nuclear weapons, advisory opinion of 8 July 1996, ICJ Reports 1996, p. 239, par. 45: "(…) it should be observed that this is not a domain in which international law imposes any special or strict requirements. Whether a statement is made orally or in writing makes no essential difference, for such statements made in particular circumstances may create commitments in international law, which does not require that they should be couched in written form. Thus the question of form is not decisive (...)".

50Rodrìguez Cedeño, Eighth report on unilateral acts of States, UN Doc. A/CN.4/557 of 26 May 2005, in Yearbook of the International Law Commission, 2005, vol. II, n. 1, 119 ss.

51Rodrìguez Cedeño, Ninth report, op. cit., 174, parr.138-139.

In the Guiding Principle n. 9, no obligations arise for States other than the declarant/s, and only in cases where these States have not accepted the same declaration.

With regard to the invalidity of unilateral declarations, the solutions tried and referred to in the final text are articulated with the proposals of the special rapporteur which were inspired again by another important guiding text for the international law, namely the VCLT suggesting the provisions details that we already know about the vices of will and their relationship with domestic law.

The Guiding Principles are limited respectively to n. 8 and no. 4, relating to the mandatory rules of international law (in analogy with the provisions of art. 53 VCLT) (Dörr, Schmalenbach, (eds., 2018)[52], as well as including the incompetence of the body that formulated the declaration. Within this spirit the Guiding Principle n. 4 affirms that:

"(...) the unilateral declaration binds the State only if it comes from a competent authority, specifying that the heads of State, heads of government and foreign ministers are *ipso facto* competent to make such declarations by virtue of their functions (…)" (Rivier, Lagrange, 2006)[53].

As for other bodies they may be authorized to bind the State with their own declarations, but only exclusively in the areas of

52According to Tomuschat: "(…) unilateral declaration by virtue of which a State promises to act contrary to the core principles of international law is essentially an announcement to commit international crimes (…) we are faced with a hypothesis far from any conceivable facts of life (...)".

53"(…) en norme (i.e. prescription) ce que le droit international érige en présomption, avec pour résultat malheureux que la prescription proposée trahit le principe général dont elle est censée être une modalité d'application (…)".

their respective competence of their capacity (Liakopoulos, 2020b)[54].

The last Guiding Principle relating to the "duration" of the obligation and its extinction demonstrates the common will and the relative obligation of a conventional nature which matures over time, i.e. the express will of the relative unilateral act which commits the State to hold a certain behavior that has changed or not. In unilateral acts, this intention is not the only relevant factor, but the legitimate expectations of third parties must also be taken into account. Factors that are identified by the Guiding Principles and by the sector of arbitrary revocations/modifications[55]. In particular, the arbitrary nature of the revocation/modification, according to the Commission, must be taken into consideration having the following elements: the declaration that admits the possibility of a subsequent revocation/modification; the extent of the credit given by the beneficiaries and; the existence of a radical change in the

54"(…) automatic authority to bind the State in matters of international relations (…) representing a State in specific fields (…) in respect of matters falling within their purview (…) of technical ministerial portfolios exercising powers in their field of competence in the area of foreign relations (...)". Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, ICJ Reports 2006, p. 6, par. 47. See also: Rodrìguez Cedeño, Nith report, op. cit., parr. 151-152: "(…) either expressly or through conclusive acts from which such confirmation can be clearly inferred (…) not authorized (or qualified) to act on behalf of the State (…)".

55"(…) specifies that the power to revoke the unilateral commitment is not excluded, but only (…) its arbitrary withdrawal (or amendment) (...)" (ILC Report 2006, op. cit., 166). According to Guiding Principle n. 10, par. 51: "(…) the unilateral undertaking from (the French) statements cannot be interpreted as having been made in implicit reliance on an arbitrary power of reconsideration (...)".

circumstances as also happens in the general rules of the treaties[56].

Unilateral declarations and binding effects. Proposals, ambiguities, problems and solutions

Anyone who carefully reads the final work of the Guiding Principles of the ILC understands that there are gaps as well as on any text that is in the first steps of processing, presenting unsolved problems and others to be solved *in tempis*. The considerations are limited to a single aspect, that of the outcome of the codification road which certainly appears problematic given that the conditions allow binding effects to be attributed to the declaration.

Conditions that are foreseen and proposed already by the Guiding Principle n.1. The binding obligation and advertising are not identified as sufficient requirements for the production of mandatory effects. The statements contain elements that may have the effect of creating legal obligations. In particular the Guiding Principle n. 7 identifies yet another requirement relating to the binding nature of the deed, namely: "(...) unilateral declaration entails obligations for the formulating State only if it

56"(…) an open ended list (…)", according to par. 2 of the comment Guiding Principle n. 10, ILC Report 2006, op. cit., 166. See also par. 3 of the Guiding Principle n. 10, which is affirmed that: "(…) unilateral declaration may also be rescinded following a fundamental change of circumstances within the meaning and within the strict limits of the customary rule enshrined in article 62 of the 1969 Vienna Convention on the Law of Treaties (...)" (ILC Report 2006, op. cit., par. 166.

is stated in clear and specific terms (...)" (Peňa Silva, 2020). This element pertains to the interpretation of the unilateral deed and raises perplexities regarding the precise classification and meaning (Kassoti, 2022). Already the jurisprudence of the International Court of Justice (ICJ) (Kolb, 2014; Liakopoulos, 2020a) which has been referred to the publicity of the deed and the specific formulation does not appear congruent given that in some cases the ICJ has dealt with elements indicating the existence of intention of the author to bind himself, i.e. autonomous requirements of the binding nature of his own commitment[57]. These are difficult requirements to ascertain due to the lack of indication in the Guiding Principles and the stringent parameters to determine the degree of notoriety required as well as the level of clarity and specificity of the commitment (Klabbers, 1996; Fitzmaurice, 2002; Kassoti, 2012-2013). It is clear that the Guiding Principles are not all consistent given that they are affected by a certain confusion which shows not a superficial work, but a concrete commitment that will be difficult to materialize immediately given the specificity of the topic and the parameters included which need clarity, concreteness and distinction of the relevant criteria for ascertaining, the existence of the will to oblige, the interpretation of the content and of the commitment undertaken

57According to par. 2 of the Comment of Guiding Principle n. 1 is affirmed that: "the public nature (…) represents an important indication of their authors' intention to commit (…)" (ILC Report 2006, op. cit., par. 162).

(Kassoti, 2022).

The final text attributes an interpretative discretion that we can see in the Guiding Principle n. 3 which determines the legal effects of the statements made publicly showing the manifestation of the ability to bind the declarant with regard to the content of his statements and as a result the obligation to accept and ascertain the reactions determined by the statements made (Tomuschat, 2008). The lack of indications and the concrete circumstances on the reactions aroused do not allow for an adequate degree of predictability to be achieved. These are factors identified in a vague and generic way without significant additions that can be deduced from the comment which actually paves the way for various interpretations and elements of wide ambiguity.

The problem remains that the ILC focuses on the reactions caused by the unilateral act in other States (Eckart, 2012). The international jurisprudence that we can use contains no support for such reactions since in the cases of the ICJ the judges were preoccupied with examining them. The conclusions reached, i.e. the effects produced were always opposite to those supported by the addressee of the act itself (Kassoti, 2013)[58].

58According to Kassoti: "(…) this element was included in the final text, without the Commission having ever addressed the issue of its relevance (…)".

Concluding remarks

Up to now we can understand that the gaps that we have reported above also arise in the case in which the ILC has not considered collective acts in the Guiding Principles and that the unilateral declarations bound are covered by specific regimes, such as for example the effects on vices of will, such as violence, error, malice, i.e. the identification that the act begins to produce effects, of the applicable regime in the event of succession of States or armed conflicts as well as in case of estoppel. The suitability of silence or informal conduct of States to produce obligatory effects is generally referred to in the Preamble[59].

The legal basis of the binding effects of promissory declarations remains open since it has not been analyzed, but only reported that:

"(…) it is often difficult to establish whether the legal effects stemming from the unilateral behaviour of a State are the consequence of the intent that it has expressed or depend on the expectations that its conduct has raised among other subjects of international law (…)" (Saganek, 2015).

As can also be read diminutively in Guiding Principle 1, whereby

"(…) when the conditions for this are met, the binding character of such declarations is based on good faith (…)" (Eckart, 2012).

The principle of good faith is connected with the jurisprudence

59In Preamble is affirmed that: "(…) behaviours capable of legally binding States may take the form of formal declarations or mere informal conduct including, in certain situations, silence, on which other States may reasonably rely (…)", (ILC Report 2006, op. cit., par. 161).

of the ICJ in the case of nuclear tests (Liakopoulos, 2020b)[60], with extensive readings of critical issues from the past (Rubin, 1977)[61]. The lack of useful indications expressed on the point during the codification works believe that the formula adopted is summarized in a vision shared by the members of the Commission. The special rapporteur addresses the question of the existence of an *acta sunt servanda* principle (Goodman, 2006) which is inspired by good faith (Kolb, 2017)[62].

Position not followed due to theoretical difficulties caused[63]. The question of the legal basis of the binding nature of the unilateral acts of the States with the proposal of Guiding Principle n. 10 identifies this foundation, the principle of good faith and the intention to expressly bind oneself to the author of the deed[64]. A profile not followed, given that the Guiding Principle n. 10 given the non-trace in the final text approved by

60"(...) basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international cooperation, in particular in an age when this cooperation in many fields is becoming increasingly essential. Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration. Thus interested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected (…)", ICJ, Legality of the threat or use of nuclear weapons, advisory opinion of 8 July 1996, op. cit., par. 46.

61"(…) it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration (…)".

62Addendum n. 3 of ILC Report 1996, op. cit., 142, par. 8. See also: Rodrìguez Cedeño, First report, op. cit., 337, par. 157.

63ILC Report 2002, op. cit., 82, par. 354.

64Rodrìguez Cedeño, Ninth report, op. cit., 177, par. 156.

the Commission[65].

The codification road was followed by the spirit of the special rapporteur provided by the first program dating back to 1996[66]. In reality, the planning road was that of the Vienna treaties and the issues addressed in the context of the two codifications[67]. A viable path with many problems within the ILC[68] given that the work done in Vienna was redimensioned and that of the unilateral acts as the special rapporteur himself referred was in "flexible parallelism"[69] and represented "(…) an essential source of inspiration (…)" (Eckart, 2012) for drafting the ILC[70] draft articles.

The model of VCLT was only an inspirational choice but not feasible in our case of unilateral acts since it goes beyond the drafting of individual provisions. Attribution and aspects have no real relevance in the practice of unilateral declarations and with respect to the development of specific rules due to lack of consistency and coherence. This pattern followed overlooked specific issues involving unilateral acts which were completely ignored by the final text.

65See the opinion of Economides, UN Doc. A/CN.4/2887 of 4 July 2006, in Yearbook of the International Law Commission, 2006, vol. I, 120 ss., 124, par. 23.

66Addendum 3 of ILC Report 1996, op. cit., 141, par. 3, lett. d): "(…) the law of treaties and the law applicable to unilateral acts of States differ in many respects, the existing law of treaties certainly offers a helpful point of departure and a scheme by reference to which the rules relating to unilateral acts could be approached (...)".

67Rodrìguez Cedeño, Second report, op. cit., 198, parr. 19 and 21, 200, par. 41.

68ILC Report 1999, op. cit., 133-134, par. 534.

69Rodrìguez Cedeño, Third report, op. cit., 251, par. 22.

70Rodrìguez Cedeño, Ninth report, op. cit., 153, par. 12.

Finally, the formulation of the Guiding Principles was based on the jurisprudence of the ICJ although the members of the ILC themselves observed that the most significant precedents were characterized as: "(…) presented a confusing picture (...)"[71]. Perhaps it was useful to better follow the relevant doctrine on the subject (Kassoti, Vatsov, 2019)[72], and the general principles of international law on the subject given that the lack of pronouncements on certain specific aspects shows the need for a more original and proposed *ab initio* and under discussion work for all participants. A work that we must see its results in the next few years.

71See the comments of Dugard, in UN Doc. A/CN.4/SR.2526 of 7 May 1998, in Yearbook of the International Law Commission, 1998, vol. I, 48 ss., 49, par. 5.

72See also by the CJEU in Joined Cases C-103/12 and C-165/12, European Parliament and European Commission v. Council of the European Union, Opinion of Advocate General Sharpston of 15 May 2014, ECLI:EU:C:2014:334, paras. 69-87. The CJEU concluded: "(...) that the declaration at bar culminated in the conclusion of an international agreement", Joined Cases C-103/12 and C-165/12, European Parliament and European Commission v. Council of the European Union of 26 November 2014, ECLI:EU:C:2014:2400, published in the electronic Reports of the cases, par. 73.

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